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Supreme Court of the United States

OCTOBER TERM, 1967

No. 531

MARGIT SIGRAY BESSENYEY,

Petitioner,

—against—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ORRIN G. JUDD
Attorney for Petitioner
655 Madison Avenue
New York, N. Y.

HENRY B. HYDE,
EARLE K. MOORE,
RONALD DREIER,
Of Counsel

32 CASE PRESS INC., 421 HUDSON ST., N.Y.—OREGON 5-4540

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Petitioner Margit Sigray Bessenyey prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered June 1, 1967.

Opinion Below

The opinion of the Court of Appeals is printed in the Appendix of this petition.

Jurisdiction

The judgment of the Court of Appeals was entered on June 1, 1967.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Involved

In an appeal from a determination by a Judge of the United States Tax Court concerning the deduction of expenses incurred in operating a horse-breeding enterprise:

1. Should the personal wealth of the taxpayer constitute a primary, if not determining, factor in denying a deduction for such expenses?

2. Does this Court's decision in *Commissioner* v. *Duberstein*, 363 U.S. 278 (1960), extend to this type of situation and prevent a Court of Appeals from setting aside a Tax Court decision based upon incorrect application of legal principles where the Court does not have "a definite and firm conviction that a mistake has been committed."

3. In an agricultural enterprise, is it necessary for the taxpayer to be able to recoup all initial losses, some of which result from special tax treatment of certain expenses, in order to defeat the claim that the enterprise is not intended to make a profit?

4. May "enjoyment of one's work" prevent a taxpayer from deducting the ordinary and necessary expenses of what is concededly a business?

The Statutes Involved

The statutes applicable at the time were Sections 162, 165, 212 and 270 of the Internal Revenue Code of 1954. The pertinent text of which is set forth in the appendix.

The Taxes in Dispute

Petitioner appealed to the Tax Court from the Commissioner's determination of an income tax deficiency against her for the taxable (calendar) years ended December 31, 1955 to 1959 inclusive and claimed an overpayment of taxes for all of such years except 1957.

The major issue on the appeal was petitioner's right to deduct certain losses incurred by her in a horse-breeding enterprise. The Tax Court held against petitioner on this issue.

The Court of Appeals affirmed in an opinion by Judge Friendly, with a concurring opinion by Judge Waterman.

The amount of taxes in issue for the five years total $93,973.49 (5(a)).*

The findings of the Tax Court are all acceptable to the petitioner, except the ultimate determination that she did not have a bona fide intention to conduct her activities for a profit (27(a)).

The conclusion concerning lack of profit motive is not in the Tax Court's "Findings of Fact" (5(a)-25(a)), but is contained in its "opinion", after a discussion of applicable legal principles (25(a)-27(a)), thus recognizing that this conclusion involved the weighing of undisputed facts in accordance with applicable law.

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* References with the suffix "a" are to petitioner's appendix.

The Facts

In capsule form, the evidence showed that petitioner devoted almost all her time to her horse-breeding enterprise, and conducted it without extravagance but that she incurred very substantial expenditures before effecting her first sale. The fact that she had substantial outside income prevented her from suffering want during this period, and in the view of the Tax Court prevented her from deducting the expenses.

Petitioner was born and raised in Hungary until she came to the United States to live in 1946 (6a). For about sixteen years before she left Hungary, the breeding, raising and training of Hungarian Half-Bred horses was her principal responsibility (7a).

The Hungarian or Hungarian Half-Bred is a distinct breed of horse which has been bred in Hungary for over one hundred years (7a). A registry is maintained there and breeding is subject to government supervision (8a). However, the Hungarian breed is a new breed in the United States (18a).

During and after World War II the United States Army acquired a number of Hungarian horses and shipped them to the United States, where most were used in the Remount Service to breed horses for the United States Cavalry (8a-9a). When the Cavalry discontinued the Remount Service, the horses were sold in 1948 (9a). Petitioner sent Dr. Bela Mariassy, a veterinarian formerly employed by the Horse Division of the Hungarian Department of Agriculture, to the sale to select and purchase for her a number of Hungarian brood mares (9a). He

purchased nine mares, which petitioner sent to the ranch of the Bitter Root Stock Farm in Montana (9a-10a).

In 1948, when the sale was held, and later when the horses were transferred to the Montana Farm, petitioner and her parents were ill (9a, 11a) so that it was not until 1954 that petitioner was ready to begin horse-breeding. She leased a Hungarian stallion which had been in the Army Remount Service and had been sold to another Montana rancher when the Cavalry discontinued horses (14a). Petitioner, from 1955 on, spent about six months each year at the Montana farm (13a). From 1954 to 1959 petitioner's mares were bred annually except for 1958 (15a). By 1959 she had increased the size of her herd from 11 to 31 (15a). By the end of 1964 the herd had been increased to 39, not including 8 mares purchased in that year (15a, 19a). The average breeding life of a Hungarian mare is about 18 years, during which she may be expected to produce ten foals (17a).

During the half of each year that petitioner spends at the Montana farm, most of her time is spent on matters relating to her horses (13a). She lives in a small cottage built for the former chauffeur, although a large mansion stands unoccupied on the property (13a). When not in Montana, petitioner still spends most of her time in other activities related to the breeding and training of horses (17a). She visits other horse breeders, views competitions and shows, and takes courses in horse management (17a). The Court recognized that petitioner devoted her energies and long periods of time to the enterprise (29a).

Petitioner had no horses available for sale until about 1959-1960 (20a). Since then she has had a maximum of

five trained geldings (20a). By 1964* she had sold only one gelding, a seven-year-old named Hungarian Patrick, for $3,000 (20a).

During the years in issue it would have been premature to set up a registry for Hungarian horses in this country (18a). That should wait until there are 100 brood mares owned by various breeders (18a).

Another breeder of Hungarian horses is Mrs. Gyurky, of Virginia, who brought 13 Hungarian horses to the United States in 1949 (18a-19a). She supported herself for seven years by teaching riding at Hollins College, but now makes a profit from her horse farm, and has no other source of income (19a). She now has a stock of 28 or 30 horses (20a).

Petitioner's total expenses in the breeding, raising and training of Hungarian horses ranged from $6,027 in 1955 to $56,231 in 1959, the last of the years at issue (24a). She employs five persons at the Montana farm and two in Maryland (12a, 14a).

The trial judge expressly found that Hungarian Half-Breds are versatile and attractive, and should compare favorably with established breeds in this country, like Arabians and quarter-horses (17a). Petitioner's horses had been successful in competitions, and had been written up in horse magazines (17a).

The foregoing views are all taken from the Tax Court's findings and opinion. *Additional facts* bearing on the pur-

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* Although petitioner's intention in the years under review was the real issue, the evidence at the trial covered her operations through 1964.

pose of petitioner's enterprise are not contradicted, although omitted from the Tax Court's findings.

The expectation of selling horses at a good price was in petitioner's mind from 1950 to 1954, before she began to devote full attention to her breeding enterprise. She testified that (147a):

> "I decided that there would be people who would appreciate these horses as much as I did and who would probably want to pay good money for something as pleasurable and as enjoyable and as good quality animal."

Petitioner hoped at first to sell her horses as yearlings, but found that she would have to sell them as trained animals until she had established the breed so people knew about them (149a). This required additional time and expense. To gain public acceptance of the horses, she thought it wise to place them with trainers in different parts of the country and let professional horse people see them (161a-62a).

Preparatory to setting up a registry, which would improve the sales price of Hungarian horses, petitioner thought it important also to enter them in different competitions throughout the United States (162a).

In 1957, before petitioner began sending her geldings for outside training and entering them in competitions, her net expenses at Montana were $13,219 (21a). At that time she had 23 horses (16a). The higher expenses in the later years are attributable largely to the training and exhibition which petitioner believes are required at the outset to establish the breed and to the necessity of keep-

ing the horses for a longer time before sale. Petitioner has entered her geldings in competitions around the United States, and they have won many prizes (Ex. 57). She is unwilling at this stage to sell a gelding to a person who will use him only for pleasure and not show him in competitions as an advertisement for the breed (285a). Since her ultimate objective is to establish the breed and to sell yearlings, she can thus get the maximum advertising value from her geldings (172a).

Petitioner believes that when a registry has been established and the quality of her herd has been recognized, it will be possible for her to eliminate the higher expenses attributable to advanced training, exhibition and advertising and to make a profit on the sale of yearlings. She submitted projections to the Court indicating that she would begin to earn a profit in 1970 (Exh. NN, pp. 22-23). In addition she will then have a herd worth over $250,000 (Exh. NN, p. 21).

Petitioner called as an expert witness Dr. M. E. Ensminger, Chairman of the Department of Animal Science at Washington State University and author of the bulletin on "Light Horses" published by the U.S. Department of Agriculture. Dr. Ensminger agreed with her conclusions.

Dr. Ensminger testified that petitioner's plant was adequate (46a), the equipment was operational (48a), and she herself was a competent horselady (57a). He believed the farm should show a profit "in proper time" (103a).

His written report stated, concerning petitioner's physical plant:

> "There is no evidence of wastefulness or elaborateness. On the contrary, the practicality of the present

> owner is conspicuously evident in the (1) modest cottage in which she lives, (2) the unpainted pole fences about the horse corrals, and (3) the open sheds that she has built for horses." (396a; Exh. 51, p. 2)

In dealing with the performance of her herd, he stated:

> "Hungarian horses are versatile, durable, attractive and intelligent. Marketwise, they will compete with the better representatives of the more popular breeds of the day; namely, Arabians, Appaloosas, Quarter Horses, and Thoroughbreds. Additionally, once established and accepted, they will enjoy the higher prices that accrue to a new breed in which there are limited numbers." (398a-99a; Exh. 51, p. 19)

In his evaluation of the operation, Dr. Ensminger commented on Mrs. Bessenyey's qualifications for the business, and on the potential market, stating:

> "In my judgment, the eventual market for high quality, versatile Hungarian horses will be good and lucrative, with the result that the enterprise should show a profit in proper time." (401a; Exh. 51, p. 21).

He pointed out that "the light horse industry is the fastest growing segment of the livestock business in America", that "it takes time to establish a new breed", and that "Mrs. Bessenyey is proceeding as expeditiously as possible in the development of the Hungarian breed" (403a-04a; Exh. 51, pp. 23-24).

The Government's writer-expert, Mr. Russell, admitted that prices comparable to those for good quality Arabians could be obtained if general acceptance of the breed was achieved and animals were developed with superior quali-

ties within that breed (367a-68a). He stated that most of the people he had described in his book were making money out of breeding (370a), but that "It is largely a gamble" (370a). He asserted that it is easier to make money in an established breed than in launching a new breed (371a-72a), but that a profitable level was frequently achieved on "one smashing success of a stallion" (371a). He had never discussed Hungarians, but saw some near Paris and thought "They looked very nice" (361a). His testimony confirmed the wisdom of petitioner's course in proving her horses in competition, for he stated on cross-examination: "Once you have achieved a comparable performance record, then you can demand a similar price" (367a).

With respect to her expectation of profit from the overall operation, petitioner testified as follows, on cross examination (270a-71a):

> "Q. Did you consider any cost when you started this horse operation in 1955? A. I considered the cost maybe differently than most considered costs. I considered that it would be expensive to build up to advertise, to build the setup. I then figured that I had something that people who liked the luxury items of life would pay well for because they would get a lot of pleasure out of it. People usually pay well for what they enjoy. I figured I would have something that people would like in the way of my horses, that they would enjoy. There would also be an appeal in them that they were new and different. People like to have something like that, like a new sports car. They like to be different from Mr. Jones, and having seen that other breeders had made a profit, I thought, being that I had something unusual, I had something to sell there."

Government counsel's final questions and petitioner's answers were (287a):

> "Q. Well, as anyone starting in an operation which takes a long time, they would possibly consider the amount of losses that they would incur before they reach a profitable area. Did you set any limit with respect to the amount that you would lose before you— A. No, I didn't think of it this way. I estimated that it would cost me quite a bit in the beginning, until I got the whole setup organized, the animals known, and then I thought, from seeing what other breeders do, and people do seem to do very well in making money with horses, that being that I had a product that I thought was superior, I would be making money through good sales.
>
> "Q. If it occurred that you never made a profit here, would you continue in this operation? A. No, I certainly wouldn't. But that is not going to occur because I have a good product."

The Tax Court decision on motive followed a discussion of the law and certain cases relating to deductibility of business losses. *Bessenyey* v. *Commissioner*, 45 T.C. 261, 273-74 (1965) (25a-27a). The Tax Court Judge based his ultimate decision on petitioner's wealth, her love of horses, her "ignorance of names, dates and figures" (28a), and the fact that another breeder of Hungarian horses, Mrs. Judith Gyurky, operated with smaller expenditures. These reasons will be dealt with below under the argument.

Reasons for Granting the Writ

The Tax Court in this case and in other recent cases involving the important and much litigated question whether certain expenses are deductible as "business" expenses or

non-deductible as "hobby" expenses seemingly based its decision primarily upon the personal wealth of the taxpayer. Although the Courts of Appeal have indicated disagreement with this approach, they have generally felt bound to affirm by virtue of self-imposed limitations on their scope of review which they have adduced from the decision in *Duberstein* v. *Commissioner*, 363 U.S. 278 (1960). This undue extension of the rule of the *Duberstein* case has deprived taxpayers of the benefit of appellate review in all but the most extraordinary cases and has prevented the development of any consistent standards of decision. As stated by the Second Circuit Court of Appeals in this case: "If our objective were to stay as close as possible to a curve plotted through the irreconcilable body of cases in this general area, we would reverse" (App. p. 12). In the particular area of tax law with which this case is concerned (i.e., the deductibility of expenditures incurred in the development of new and speculative ventures), the uncertain rules of deductibility and the emphasis which the Tax Court has placed on the wealth of the taxpayer have been most harmful. Investment in experimental and speculative fields by the only persons able to risk substantial resources has been discouraged. The statute furnishes no guide to decision and the Court has never declared itself on the subject. A clarification by this Court of the scope of appellate jurisdiction and of the standards for deduction of such expenditures would reintroduce much-needed certainty in this important area of law.

I

The Taxpayer's Personal Wealth Should Not Constitute a Determining Factor in the Deductibility of What Would Otherwise be Business Expenses.

The emphasis of the Tax Court on the personal wealth of the taxpayer is revealed by its opinion. The first two sentences on its determination on profit motive followed the discussion of the law:

> "Although petitioner's horse enterprise has some of the trappings of a business, we think that she did not in fact have a bona fide intention to conduct her activities for a profit. *She is a person of considerable wealth,* an experienced horsewoman who obviously has a love for horses, particularly Hungarian Half-Breds, which she had raised on her father's estate in Hungary for many years prior to 1946." (27a) (Italics added).

The Tax Court made no analysis of taxpayer's projections of income and expectation of profitable operations and gave no specific reason for questioning same.

The growing tendency of the Tax Court to treat the personal wealth of the taxpayer as disproving a profit motive, especially when combined with enjoyment of the enterprise, led to a dissent by Circuit Judge Waterman in the earlier case of *Schley* v. *Commissioner,* 375 F. 2d 747 (2d Cir. 1967), where he stated (at p. 761):

> "I apprehend that the Commissioner was so impressed with the fact that Mrs. Schley had an income of $90,000 a year that, despite the fact that this farming enterprise had all the characteristics of a going farm, and the 'profit motive' of its owner

would normally be taken for granted, he thought the national revenue required him to determine the deficiencies here in suit."

In his concurring opinion in this case Judge Waterman stated (App. pp. 15-17):

> "I must point out, however, that I am disturbed by the slant the Tax Court has adopted when it determines whether a very wealthy taxpayer's activity in the production of economic goods has been motivated by a 'profit motive.'"
>
> * * * * *
>
> "It would seem that, as to a wealthy taxpayer, inasmuch as losses taxpayer incurs may be comfortably absorbed by him he could not have had a profit motive in engaging in the business activity that resulted in the losses.
>
> "Of course an independently wealthy person will naturally be less concerned about temporarily making ends meet in the business activity in which he is engaged than one who, as taxpayer's parallel horse-breeder here, 'is in the serious business of making a living.' But this no more indicates that the activity is conducted *primarily* for pleasure, see Treas. Reg. § 1.212-1(c), than does a large corporation's expenditure of huge sums for new product development and marketing indicate it."
>
> * * * * *
>
> "For example, here the Tax Court apparently disregarded the testimony of taxpayer's expert to the effect that 'the enterprise should show a profit in proper time' and that taxpayer was 'proceeding as expeditiously as possible' in her long-range plan of developing a new breed of luxury horses. While in this case I cannot term the Tax Court's inferences

> fallacious or its ultimate finding 'clearly erroneous,' I would suggest that the court in adjudicating cases of this kind could well give more serious consideration to such factors as whether the expectation of an ultimate profit is reasonable, how the operation is conducted, to what extent the taxpayer personally participates therein, and the likelihood that the activity taxpayer is engaged in is encompassed within the normal activities that occupy the time of other wealthy taxpayers. Surely such factors are as relevant to the question of a taxpayer's intent as the single factor of enjoyment of one's work."

Another case where the taxpayer's personal wealth was apparently a determining factor against him even though the activity involved "worthy and useful services" was *White* v. *Commissioner*, 227 F. 2d 779 (6th Cir. 1955) cert. denied 351 U.S. 939 (1956) involving a ballistics laboratory with seventeen years of losses.

The decisive effect which the Tax Court has come to give to a taxpayer's personal wealth is illustrated by the contrary decision in *Prickett* v. *Commissioner*, 26 T.C.M. 5 (1967), decided after the *Bessenyey* case. There an engineer, who had an early interest in cattle-raising, was permitted to deduct his farming losses, although they were very substantial in relation to his gross income. A different Tax Court Judge distinguished the *Bessenyey* case on the ground that "petitioners were not persons of substantial means" (26 T.C.M. at 7).

The personal wealth of a taxpayer formerly did not prevent a determination that he could deduct business losses from the operation of a stable, even though he had not claimed deductions during the first nine years of the opera-

tion. *Whitney* v. *Commissioner*, 73 F. 2d 589, 591 (3d Cir. 1934).

Similarly, in *Doggett* v. *Burnet*, 65 F. 2d 191 (App. D.C. 1933), a record of ten years continuous losses was held not enough to support the denial of deductions. The Court said (p. 194):

> "The proper test is not the reasonableness of the taxpayer's belief that a profit will be realized, but whether it is entered into and carried on in good faith and for the purpose of making a profit, or in the belief that a profit can be realized thereon, and that it is not conducted merely for pleasure, exhibition, or social diversion.
>
> * * *
>
> "We think a better test to be applied here is whether or not the person engaged in a legitimate enterprise shows a willingness to invest time and capital on the future outcome of the enterprise, whether it be successful or unsuccessful."

The fact that the Court of Appeals in this case had to put aside *Doggett* v. *Burnet* as running "counter to the trend" shows that the determination here is based on a new legal concept of "trade or business".

Another early case gave weight to the fact that the operation of a stock farm for breeding horses was "business-like in every way". *Blake* v. *Commissioner*, 38 B.T.A. 1457 (1938).

Under the decisions in this area of the law shortly prior to the recent decisions heretofore cited, the petitioner should have prevailed since she was not concerned with "pleasure, exhibition or social diversion"; but she was will-

ing "to invest time and capital on the future outcome of the enterprise."

Where personal wealth is accompanied by lavish or wasteful expenditure, there is, no doubt, reason to question deductibility. Where, however, a person able to spend wastefully does not do so, the opposite inference should follow, namely, that the venture is intended to be profit-making. Clearly, no adverse inference should be drawn from the wealth of the taxpayer in such a case.

Instead of examining the taxpayer's conduct to determine whether she was conducting the venture in a business-like way, the Tax Court adapted the easy expedient of basing its decision upon her wealth. This inverse discrimination is not a proper basis for decision.

II

The Court of Appeals Was Unduly Restricted in Its Review of the Tax Court by its Interpretation of This Court's Decision in *Duberstein*.

Generally, an innovation in law undertaken on its own initiative by the Tax Court and contrary to the trend of past decisions would be remedied by the appellate courts. The Court of Appeals in this case, after reviewing the opinion below and the facts, indicated that it would probably have decided the case differently, but that it felt bound by *Duberstein* v. *Commissioner*, 363 U.S. 278 (1960) to affirm the Tax Court since it didn't have "a definite and firm conviction" that an error has been committed "even though this may have the unfortunate consequence of lessening the predictability peculiarly essential in tax matters" (App. pp. 14-15).

We doubt that this Court's decision in *Duberstein, supra,* was ever intended to prevent the Courts of Appeal from performing their most significant function—that is maintaining consistency and predictability in federal law.

The substantive question involved in *Duberstein, supra,* was whether certain specified payments made by corporations were, to the recipients, excludable gifts or taxable income. After disposing of the substantive question this Court, at the urging of the Government, discussed the method by which it felt cases of that type (gift vs. income) should be decided (pgs. 289-291). In that connection this Court indicated that the Tax Court should be upheld unless the Court of Appeals has "a definite and firm conviction" that an error has been committed.

The classification of transfers as gifts or as payments is unlikely to involve significant sums either for a taxpayer or for the Treasury and each case is likely to depend on the particular balance of business and personal relationships. There is therefore, no pressing need for predictability or uniformity of decision in that area. However, a taxpayer contemplating a new venture which may entail some years of expenditure for marketing, promotion, product development and like matters, ought to be able to make some reasonably accurate prediction as to the tax treatment of such expenditures and such prediction should not depend on personal wealth or on whether success comes quickly or is long delayed or even fails entirely.

It is therefore important that the appellate function of the Courts of Appeal not be unduly curtailed in this area.

Furthermore, even in *Duberstein* this Court held that a conclusory finding that a transfer was a gift was not suffi-

cient and that the legal standards which were applied in making that decision should be indicated. Presumably, the purpose of setting forth such standards is to furnish a basis for review by the Court of Appeals. This Court should make clear the implication in *Duberstein* that a Court of Appeals may set aside a Tax Court decision if it finds that improper legal standards were used, whether or not it is convinced that the wrong result was reached.

This principle was applied by the Third Circuit Court of Appeals in *Imbesi* v. *Commissioner*, 361 F. 2d 640 (3d Cir. 1966), where it stated (p. 645):

> "It therefore follows that in a case of this kind where the trial tribunal's factual findings and inferences are final unless shown to be clearly erroneous, it must affirmatively disclose what disposition it made of so important a factor as the taxpayer's testimony of a profit motive. The Tax Court's decision does not do so."

The Second Circuit Court of Appeals in this case considered itself bound to affirm because of the *Duberstein* case, even though they would reverse "If our objective were to stay as close as possible to a curve plotted through the irreconcilable body of cases in this general area . . ." (App. p. 12). The Court treated the case as involving "factual inferences from undisputed basic facts."

In drawing inferences of ultimate fact, the Tax Court chose to give significance to some of the basic facts and to disregard others. Thus it chose to give weight to taxpayer's wealth and her life-long interest in horse breeding. It chose not to analyze her income projections. In making these choices the Tax Court necessarily was guided by legal principles.

Where determinations have to be wrested out from legal principles, as in many of the agricultural cases, it is necessary that there be some control over the application of those legal principles. Otherwise, the result will be as variable as the Chancellor's foot (see Selden, *Table Talk*, Ch. XXXVIII, p. 44).

The concept of what constitutes a trade or business has shifted through the years, more as a result of varying legal emphases than on the basis of facts of the particular case.

The *Duberstein* case should not be interpreted to permit a gradual change in the legal interpretation of a statute, under the guise of deciding differently similar questions of ultimate fact. This Court should grant *certiorari*, in order to correct the serious error in this case, and set standards for future business deduction cases.

III

In an Agricultural Enterprise Initial Book Losses Do Not Show That the Undertaking is a Mere Hobby nor Must All Initial Expenses be Recoupable in Order for the Taxpayer to Have a Bona Fide Profit Motive.

Petitioner's brief in the Court of Appeals called attention to the special rules which Congress had adopted in order to promote agriculture. These permit deduction as ordinary expenses for items which are essentially capital expenditures. For example, costs of clearing land, producing feed, and care and training of animals.

As the Court will observe from the schedule of expenses incurred by petitioner (21a), practically all the items in question except, perhaps, depreciation, repairs and taxes,

involve costs incurred in producing, caring for and training the petitioner's animals. Except for the special rules relating to farmers, most of petitioner's costs would be capitalized as a cost of the breeding herd (which would be depreciable over the life of the breeding herd) or a cost of the sale herd (which would be treated as a cost of "inventory" and would be deductible only as cost of goods sold when the particular animal is sold). In the same manner, training costs would also be deemed a capital cost of producing saleable animals.

If the accounts of the petitioner were restated to show her true economic position, the so-called "losses" would be diminished to a point where they are insubstantial in light of the total farming operation. Only because of the special tax rules applicable to farmers do the tax returns of petitioner show substantial losses.

The impact of this factor was not discussed in the Opinion of the Court of Appeals. Disregard of this factor led the Tax Court to another erroneous standard of judgment, as evidenced by the following statement in its opinion:

> "On the other hand, the presence of losses in the formative years of a business, particularly one involving the breeding of horses, is not inconsistent with an intention to achieve a later profitable level of operation, bearing in mind, however, that the goal must be to realize a profit on the entire operation, which presupposes not only future net earnings *but also sufficient net earnings to recoup the losses which have meanwhile been sustained* in the intervening years." (27a) (Emphasis added)

Many items of expense such as clearing land, represent permanent non-depreciable investments in the business

which might never be recouped except upon sale of the property. Other expenses to establish the breed on the market, such as expense of training, shows and competitions, are permanent in character and would be reflected in the operations of the business so long as it was carried on. There is no requirement that "losses" sustained by reason of such expenditures be recoverable in any definable period.

Furthermore, the Courts have recognized that if there is a miscalculation in good faith, early expenditures may never be recoverable but good business judgment might dictate that the business nevertheless be continued for the small profits which it can produce.

Necessity for recoupment was apparently not considered pertinent in *Turner* v. *Commissioner*, 23 T.C.M. 1186 (1964), where the taxpayer had a record of fourteen consecutive years of losses aggregating over $306,000. While she had hopes of making the farm profitable in future years, there was no suggestion that her profits would recoup all the prior losses. Yet the Court held that she was operating the farm "on a commercial basis and not a personal one" (p. 1191). To the same effect see *White* v. *Commissioner, supra.*

Congress in Section 270 of the Internal Revenue Code, has recognized that a business may sustain a long period of losses before it becomes profitable. That section provides that if the deductions attributable to a trade or business have exceeded the gross income from such trade or business by more than $50,000 for five consecutive years, the tax shall be recomputed and "such deductions shall be allowed only to the extent of $50,000 plus the gross income of such trade or business."

The significance of this provision was recognized in *Metcalf* v. *Commissioner*, 22 T.C.M. 1402 (1963), where there had been continual losses in a dairy operation from 1932 to 1957. The Court in that case pointed out that Congress must have recognized that business enterprises may be operated at substantial losses for a number of years, because it limited the deductible loss to $50,000 per annum if losses in excess of that amount had been sustained for five consecutive years (I.R.C. 1954, § 270, cited at 22 T.C.M. 1411, n. 2).

By insisting that the anticipated level of profits must be sufficient to recoup all prior "losses," the Court below has imposed upon this taxpayer a legal standard not heretofore employed by any other court in any comparable case. As applied to a farming operation, the new test is completely unfair and unrealistic.

IV

The Court Should Adopt an Objective Test of "Ordinary and Necessary Expenses of a Trade or Business".

This Court has not yet considered the proper definition of a "trade or business" as against a "hobby". The profit motive test has been adopted in a number of cases but no such test appears in the statute. However, motive is a purely subjective matter which must always elude analysis. Questions must be decided on the basis of objective criteria.

The determining facts should be whether the venture is one which is generally considered as a business and whether

the taxpayer conducts it in a business-like way. Considerable latitude should be allowed a taxpayer in judging whether a business can be profitable, particularly where intangibles are involved, such as the acceptability of a new product in the market. Taxpayers should not have to depend on the business judgment of treasury agents or even judges, especially since such judgment is always made with the benefit of hindsight.

If it appears from the nature of the operation that unbusinesslike motives exist, i.e. that there are particular expenditures which are attributable to the taxpayer's pleasure and not to the necessaries of the business, those expenditures should not be and are not deductible.

An example of the allocation of expenses between business expenses and those which were not ordinary and necessary for business purposes was applied in *Sabelis* v. *Commissioner*, 37 T.C. 1058 (1962). There the wife had always wanted to operate a farm, the breeding stable enabled her daughter to engage in 4-H projects, and the premises were used as residence by the husband, a business executive, and his mother. Nevertheless, the breeding farm was held to constitute a trade or business, and the expenses were allowed, less 45% allocated to residential use and 4-H activities.

The uncontroverted testimony shows that petitioner devoted the major portion of her working hours to the operation of her horse-breeding enterprise; that she conducted it in a businesslike way with careful records, trained personnel, and a concentration of effort on the training of her horses and the improvement of the enterprise. Therefore,

denying her a deduction for the legitimate expenses of a concededly businesslike operation because of a debatable finding of a lack of "profit motive" is contrary to the intent of Congress.

The decision below is an important one in an unduly confused area of tax law, which this Court should clarify. It also unduly extends the rule of the *Duberstein* case. The scope of review of the Courts of Appeal under that rule should also be clarified.

CONCLUSION

The petition for certiorari should be granted.

Dated: August 23, 1967

Respectfully submitted,

ORRIN G. JUDD
Attorney for Petitioner

HENRY B. HYDE,
EARLE K. MOORE,
RONALD DREIER,
Of Counsel

APPENDIX A

Statutes Involved

The statutes applicable at the time were Sections 162, 165, 212 and 270 of the Internal Revenue Code of 1954:

"SEC. 162. TRADE OR BUSINESS EXPENSES.

(a) In General.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business; * * *".

* * *

"SEC. 165. LOSSES.

(a) General Rule.—There shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise.

* * *

(c) Limitation on Losses of Individuals.—In the case of an individual, the deduction under subsection (a) shall be limited to—

(1) losses incurred in a trade or business;

(2) losses incurred in any transaction entered into for profit, though not connected with a trade or business; * * *."

* * *

"SEC. 212. EXPENSES FOR PRODUCTION OF INCOME.

In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year—

(1) for the production or collection of income;

(2) for the management, conservation, or maintenance of property held for the production of income; * * *."

"SEC. 270. LIMITATION ON DEDUCTIONS ALLOWABLE TO INDIVIDUALS IN CERTAIN CASES.

(a) Recomputation of Taxable Income.—If the deductions allowed by this chapter or the corresponding provisions of prior revenue laws other than specially treated deductions, as defined in subsection (b) allowable to an individual (except for the provisions of this section or the corresponding provisions of prior revenue laws) and attributable to a trade or business carried on by him for 5 consecutive taxable years have, in each of such years (including at least one year to which this subtitle applies), exceeded by more than $50,000 the gross income derived from such trade or business, the taxable income (computed under section 63 or the corresponding provisions of prior revenue laws) of such individual for each of such years shall be recomputed. For the purpose of such recomputation in the case of any such taxable year, such deductions shall be allowed only to the extent of $50,000 plus the gross income attributable to such trade or business, except that the net operating loss deduction, to the extent attributable to such trade or business, shall not be allowed."

APPENDIX B

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 368—September Term, 1966.

(Argued April 6, 1967 Decided June 1, 1967.)

Docket No. 30659

MARGIT SIGRAY BESSENYEY,

Petitioner,

—v.—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Before:

WATERMAN, FRIENDLY and ANDERSON,

Circuit Judges.

Petition to review a decision of the Tax Court, Arnold Raum, *Judge*, 45 T. C. 261 (1965), insofar as it denied deductions for the tax years 1955-59 for losses incurred in the breeding and raising of horses. Affirmed.

ORRIN G. JUDD (Goldstein, Judd & Gurfein, New York, N. Y.; Saul D. Kronovet, Earle K. Moore and Ronald Dreier, of Counsel), *for Petitioner.*

Appendix B—Opinion of the United States Court of Appeals for the Second Circuit

STUART A. SMITH (Mitchell Rogovin, Assistant Attorney General; Lee A. Jackson and David O. Walter, Attorneys, Department of Justice, Washington, D. C.), *for Respondent.*

FRIENDLY, Circuit Judge:

Mrs. Margit Sigray Bessenyey seeks review of a decision of the Tax Court, 45 T.C. 261 (1965), insofar as it denied the deduction of losses[1] incurred in the tax years 1955-59 in the breeding and raising of horses.[2] The facts are quite fully stated in Judge Raum's opinion and a summary will suffice to expose the issue.

Mrs. Bessenyey, a woman in her fifties, resides in New York City. She is the daughter of a Hungarian count and his American wife and the granddaughter of Marcus Daly, the "copper king" of Montana. She was born and raised on her father's large Hungarian estate, a family farm devoted to forestry production and crop and livestock cultiva-

[1] The relevant provisions are I.R.C. §§ 162, 165 and 212.

[2] The deductions were:

1955	$ 6028
1956	9142
1957	18162
1958	35393
1959	56231

In later returns the taxpayer claimed similar deductions as follows:

1960	$64133
1961	75550
1962	63708

tion. The latter included horse breeding and training—heavy horses for agricultural work, and riding and carriage horses, known as Hungarians or Hungarian Half-Breds, primarily for use on the estate but also occasionally for sale. Under her father's guidance she obtained substantial knowledge of this subject and from about 1930 to 1946 had principal responsibility for the breeding and training of the Hungarian Half-Breds. After the end of World War II the family emigrated to the United States.

Some time thereafter Mrs. Bessenyey learned that the Army had brought some Hungarian Half-Breds back to this country and placed them in the Remount Service of the Cavalry and, later, in 1948, that the horses were to be sold. Thinking it would be a pity if these good blood lines were "to get scattered amongst people who did not know what they were" and hoping "in the future to be able to breed them and continue," she decided to buy some. Since illness prevented her attending the sale, she commissioned a Hungarian veterinarian who had formerly worked for the Hungarian Department of Agriculture in connection with the state farms which raised these horses to purchase mares with "the best blood lines" for her; he bought nine brood mares for about $150 each. She first had the horses sent to a ranch in Montana which had been owned by Marcus Daly, and had passed to his descendants. Then, hearing that the horses were not receiving proper care, Mrs. Bessenyey journeyed to Montana, placed them at an adjacent family property known as the Montana Farm, and returned to New York because of her illness and that of her parents.

Appendix B—Opinion of the United States Court of Appeals for the Second Circuit

No breeding was done until 1954 when Mrs. Bessenyey leased a Hungarian stallion, Hompolgar IV, also known as Humphrey, who had been brought from Europe by the Army and later sold. As the result of his service, both immediate and mediate, the initial herd increased to 31 by 1959. Prior to 1955 Mrs. Bessenyey had purchased a 510 acre farm in Charles County, Maryland, because of uncertainty whether her relations with the other Daly heirs would permit continued maintenance of the horses at the Montana Farm. Although she acquired the full interest in both the Montana Farm and the adjacent ranch in 1962, she has kept the Maryland Farm and used it for the boarding and training of some of the horses especially during months when the cold Montana winter impedes training there. Since 1955 she has spent between five and six months of each year at the Montana Farm, living in what had formerly been the chauffeur's cottage and devoting most of her time to the horses; during the rest of the year she has spent considerable time visiting her trainers, comparing notes with other horse breeders, viewing competitions and shows, and attending horse management courses.

Total expenses of the Montana Farm rose from $2546 in 1955 to $46,037 in 1959, and of the Maryland Farm from $3482 to $10,195. Combined income during the tax years here in question ranged from a low of $683 in 1958 for tobacco sales from the Maryland Farm to a high of $4034 the following year for tobacco and hay sales from the Maryland Farm and Agricultural Program Payments to the Montana Farm. Mrs. Bessenyey has sold only one Hungar-

ian, a seven year old gelding for $3000 in 1964. Successful sales depend in some measure on the establishment of a registry for Hungarians in the United States. Before doing this it would be preferable to await the existence of 100 brood mares, whereas in 1964 Mrs. Bessenyey had only 28 mares and fillies and the only other breeder, a Mrs. Gyurky, had 12.

As this recital of her expenses and losses makes evident, Mrs. Bessenyey is a woman of independent means. For example, in 1956 she received $129,587 in dividends and $18,743 in tax exempt income; the corresponding figures for 1959 were $139,504 and $10,417. In 1962 she made sales of securities, evidently in anticipation of that year's stock market drop, which produced capital gains of $1,844,102, and contributed securities with a fair market value of $2,959,401 to a wholly owned corporation that had become sole owner of the Montana ranch.

Mrs. Bessenyey testified that the expectation of selling the horses at a good price was on her mind before 1955, when she began to devote full attention to their breeding and training. She later discovered that until the breed had acquired public acceptance, she would have to sell the horses as trained animals. Thus she began to incur heavy expenses for training and exhibiting her geldings. In a protest filed in September, 1961, she estimated that sales would first produce a profit in 1970, that by 1975 she would have an annual income of $25,000, and that by that time her herd would be worth at least $254,000—slightly less than the expenses incurred for the four years, 1959-62. This

projection, though, was based on the assumption that by 1970 training needs would be diminished so that annual expenses could be reduced from the 1959-62 average of about $65,000 to $36,420, an assumption which the Tax Court regarded with a "dim view" and did not deem to be sincerely entertained.

Judge Raum began his discussion by stating that "Under any of the possibly pertinent provisions of the 1954 Code, it is necessary that the operation be conducted for the purpose of making a profit" if a deduction was to be allowed. While such a purpose may exist even in the face of a history of unrelieved losses, such losses and the likelihood of achieving a profitable operation have an important "bearing on the taxpayer's true intention." He found that "although petitioner's horse enterprise has some of the trappings of a business, . . . she did not in fact have a bona fide intention to conduct her activities for a profit" and that her rewards from her work with the horses and the expenditures upon them "consisted of personal satisfaction in the activity." He based this conclusion in part on "the impression from observation of her during her testimony that figures and financial matters even bored her," an attitude which led him to believe "that she gave little or no thought to whether her horse enterprise would ever be profitable, or whether the large losses that were being sustained annually would ever be recouped."

The exceedingly able argument of taxpayer's counsel challenged the Tax Court's conclusion on many fronts. He

stressed such undisputed facts as Mrs. Bessenyey's expert qualifications in the breeding and training of Hungarian horses, the time and effort devoted to the task, the practical and nonrecreational character of her farms, the keeping of detailed accounts, the rapid development of the light horse industry in America, and the Spartan conditions of her life in Montana. He cited her testimony that although she knew it would be expensive to build up the herd, she expected to end with a new and different luxury item for which rich people would pay well, and that she would not continue the operation if she would never make a profit but "that is not going to occur because I have a good product"—a view confirmed by an expert witness. He discounted the conclusions the judge drew from observations of Mrs. Bessenyey as having stemmed from a belief, erroneous although not unnatural in one whose daily concern is with figures, that a taxpayer who relies on books and accountants for detailed information thereby displays a lack of profit motive. He pointed to the large amount of the losses in relation to Mrs. Bessenyey's investment income, e.g., $56,231 of losses for 1959 as compared with $139,504 in dividends and $10,417 in tax exempt income—rather a high proportion for a hobby, even though the same year produced capital gains of $73,531. He further argued that the large losses taken as deductions are attributable in part to the liberality of the Internal Revenue Service in ruling that "A farmer who operates a farm for profit is entitled to deduct from gross income as necessary expenses all amounts actually expended in the carrying on of the business of farming," Reg. § 1.162-12, such expenses in-

cluding many amounts, e.g., feed and training costs, that might be considered to be capital expenditures under ordinary accounting principles. In summary he asked us to rule that the finding as to Mrs. Bessenyey's lack of profit motive is clearly erroneous within the formulation of United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948), and urges that reversal is necessary in the interest of achieving consistency and avoiding results "as variable as the Chancellor's foot," citing Selden, Table Talk, c. 38, p. 44 (1689).

If the matter were *res nova*, question could well be raised whether Congress intended that when certain productive activity is generally regarded as a business for which taxpayers can deduct expenses or losses, a particular taxpayer engaged in precisely the same physical acts should be refused a deduction because of lack of the profit motivation the others had.[3] Certainly the lack of profit motivation does not affect how the activity will contribute to the overall economic welfare. On the other hand, under high tax rates such a test would put the government in the presumably undesired position of subsidizing activities in which wealthy persons engage primarily for pleasure, see Reg. § 1.212-1 (c) denying deductions for transactions "carried on primarily as a sport, hobby, or recreation . . ." and Surrey & Warren, Federal Income Taxation, Cases and

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[3] As counsel for the taxpayer has argued, extravagance in operations could be handled by disallowing excessive expenses. Although this approach would involve administrative difficulties, they might not exceed those of the profit motive test.

Materials 344-45 (1960 ed.). However, we are not writing on a clean slate. Although "horse breeding and racing, though the sport of kings, have been held in a surprising number of cases to be the business of taxpayers," Bittker, Federal Income, Estate and Gift Taxation 207 (3d ed. 1964)—and even of rich ones, see, e.g., *C. I. R.* v. *Widener*, 33 F. 2d 833 (3 Cir. 1929), affirming a 9-6 decision of the Board of Tax Appeals, 8 B. T. A. 651 (1927); and *Whitney* v. *C. I. R.*, 73 F. 2d 589, 591-92 (3 Cir. 1934), and *Farish* v. *C. I. R.*, 103 F. 2d 63 (5 Cir 1939), reversing the Board —the courts found a profit motive in all these cases.[4] The established rule, approved by this circuit and others, is that deductibility of "business-like" expenses or losses is denied unless the taxpayer can show an intention to seek profit. *Morton* v. *C. I. R.*, 174 F. 2d 302, 304 (2 Cir.), cert. denied, 338 U. S. 828 (1949); *Ewing* v. *C. I. R.*, 213 F. 2d 438, 439-40 (2 Cir. 1954); *Lamont* v. *C. I. R.*, 339 F. 2d 377, 380 (2 Cir. 1964); *Schley* v. *C. I. R.*, —— F. 2d —— (2 Cir. 1967), slip opinion, 1639; *Szmak* v. *C. I. R.*, —— F. 2d —— (2 Cir. 1967), slip opinion, 1899; *Deering* v. *Blair*, 23 F. 2d 975, 976 (D. C. Cir. 1928); *Coffey* v. *C. I. R.*, 141 F. 2d 204, 205 (5 Cir. 1944); *White* v. *C. I. R.*, 227 F. 2d 779, 780 (6 Cir. 1955), cert. denied, 351 U.S. 939 (1956); *Wise* v. *C. I. R.*, 260 F. 2d 354 (6 Cir. 1958); *Hirsch* v.

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[4] See also *John S. Ellsworth*, 21 T. C. M. 145 (1962), where a wealthy taxpayer whose prime source of income was dividends and interest was held to have been engaged in business in conducting "Folly Farm" despite 13 years of uninterrupted losses aggregating almost $700,000, his own acknowledgment of the fact that when he entered the "business" at age 65, he realized that he would not make a profit before attaining 75 or 80, and evidence that his interest in breeding was scientific.

C. I. R., 315 F. 2d 731, 736-37 (9 Cir. 1963).[5] Compare Reg. §1.212-1(c). Insofar as *Doggett* v. *Burnet*, 65 F. 2d 191, 193-94 (D. C. Cir. 1933), or *Cecil* v. *C. I. R.*, 100 F. 2d 896, 901 (4 Cir. 1939), may contain contrary intimations, they run counter to the trend. Indeed, counsel for Mrs. Bessenyey does not urge us to reject the profit motive test but rather asks us to hold the Tax Court to have been in clear error in finding that she failed to meet it.

If our objective were to stay as close as possible to a curve plotted through the irreconcilable body of cases in this general area, we would reverse. Speaking about deductions for losses on country estates and racing stables, Randolph Paul noted long ago that "The American businessman has never appeared so indefatigably optimistic as in some of the cases on this point; taxpayers have earnestly contended (sometimes successfully) that they expected to reap an ultimate profit even though operating losses exceeded receipts with depressing regularity over a long period of years." Motive and Intent in Federal Tax Law, in Selected Studies in Federal Taxation 281-82 (2d Series, 1938). The degree of taxpayers' success is attested by the

[5] As said in the last cited case, "The spending of time, money and effort as a corporate executive or in any activity or venture in the general realm of business, however, does not per se put a taxpayer in 'business' within Section 23 [1939 Internal Revenue Code]. From the early case of Wilson v. Eisner, 282 F. 38 (2d Cir. 1922) through Brooks v. C. I. R., 274 F. 2d 96 (9th Cir. 1959) and Wright v. Hartsell, 305 F. 2d 221 (9th Cir. 1962), the warp and woof of the definitions of 'carrying on any trade or business' as used in Section 23 and elsewhere in the Act, is that the activity or enterprise claimed to constitute 'carrying on a business' be entered into, in good faith, with the dominant hope and intent of realizing a profit, i.e., taxable income, therefrom." *Hirsch* v. *C. I. R.*, *supra*, 315 F. 2d at 736.

many decisions cited in 5 Mertens, Law of Federal Income Taxation, § 28.74 notes 42-49 (1963 rev.), which also notes the occasional failures. Again, if the case were to be decided by a nose-count of the recognized "Factors Indicating Operation as Business or Transaction Entered Into for Profit," see 5 Mertens, *supra*, § 28.73, we think the taxpayer would win. But we have been instructed that these are not the proper criteria for an appellate court when a tax case turns on an issue of intent. *C. I. R.* v. *Duberstein*, 363 U. S. 278, 289-91 (1960). The Supreme Court's decision rested on the belief that where a court must apply a statutory tax standard of a "nontechnical nature," decision necessarily turns on "the close relationship of it to the data of practical human experience, and the multiplicity of relevant factual elements, and their various combinations, creating the necessity of ascribing the proper force to each," 363 U.S. at 289; determination "must be based ultimately on the application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case," 363 U.S. at 289; and appellate efforts to set guidelines within the broad standard would elevate mere "maxims of experience" into rules of law. 363 U.S. at 287.[6] Thus "appellate review of determinations in this field must be quite restricted," and the findings of a trial judge, including "factual inferences from undisputed basic facts . . . as will on many occasions be presented in this area," are not to be upset unless "clearly erroneous," *C. I. R.* v. *Duberstein*, *supra*, 363 U.S. at 290-91, citing

[6] As the *Lamont* and *Schley* courts held, these considerations apply to the determination of a taxpayer's desire for profit as strongly as to the determination of a transferor's intent—the issue in *Duberstein*.

F. R. Civ. P. 52(a), made applicable to the Tax Court, by I. R. C. § 7482(a).

We cannot conscientiously say Judge Raum's conclusion that Mrs. Bessenyey "did not in fact have a *bona fide* intention to conduct her activities for a profit" leaves us with a "definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948). A composite of such facts as her professed interest in the breed's fate, her mounting expenses, the long period before any expected initial profit, the meagerness of this profit in relation to the sums expended, her somewhat casual attitude on the subject, and her economic independence permit a reasonable conclusion, which the judge's observation fortified, that she started her activity primarily to preserve the breed with which she had worked as a young noblewoman and continued without much caring whether she made a profit or not although naturally hoping that she might. It is immaterial that the record would also have supported a contrary view. While we do have "a definite and firm conviction" that the judge here did not make good on the Court's prophecy of "a natural tendency of professional triers of fact to follow one another's determinations, even as to factual matters," 363 U.S. at 290, as we read *Duberstein* such a failure is not enough for reversal. If the judge thought, as he might well have, that other courts had been overly credulous regarding the profit motivation of wealthy taxpayers who have viewed long years of equine losses with an equanimity not manifested in true business ventures, he was free to follow his bent. The mandate of

Duberstein to an appellate court is to give "primary weight . . . to the conclusions of the trier of fact" as against "an academic desire for tidiness, symmetry and precision," 363 U.S. at 289-90, even though this may have the unfortunate consequence of lessening the predictability peculiarly essential in tax matters.

Judgment affirmed.

WATERMAN, Circuit Judge (concurring):

I concur with my brothers in affirming the Tax Court. If I had been the trier of fact I might have been inclined to have reached a different result than was reached below, but as I must appraise the facts the Tax Court found by adherence to 26 U. S. C. § 7482(a) and to the rules announced in *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395 (1948), and *Commissioner* v. *Duberstein*, 363 U. S. 278, 289-291 (1960), this inclination is insufficient to justfy another dissent by me from a majority opinion of a panel of my brothers. See *Schley* v. *Commissioner*, 2 Cir. Mar. 17, 1967.

I must point out, however, that I am disturbed by the slant the Tax Court has adopted when it determines whether a very wealthy taxpayer's activity in the production of economic goods has been motivated by a "profit motive." See *Schley* v. *Commissioner, supra* (dissenting opinion). It would seem that it has become the Tax Court's practice to emphasize by an emphasis which I believe to be out of proportion to a "close relationship to the data of personal human experience and the multiplicity of relevant factual elements"[1] the factors of a taxpayer's great wealth and

[1] *Commissioner* v. *Duberstein*, 363 U. S. 278, 289.

income, his love of his work, and the losses he incurs in prosecuting that work. And as to the losses, even though they, as in *Schley,* may have been occasioned by a forward-looking somewhat expensive temporary program adopted in the relevant taxable years so as to make future farming operations profitable, or, as here, may have been occasioned by Bessenyey's firm belief that her horse enterprise would assuredly make profits for her in the future, the fact that the taxpayer is wealthy enough to absorb the losses appears automatically to result in having findings found below such as those here: "Her rewards consisted of personal satisfaction in the activity." It would seem that, as to a wealthy taxpayer, inasmuch as losses taxpayer incurs may be comfortably absorbed by him he could not have had a profit motive in engaging in the business activity that resulted in the losses.

Of course an independently wealthy person will naturally be less concerned about temporarily making ends meet in the business activity in which he is engaged than one who, as taxpayer's parallel horse-breeder here, "is in the serious business of making a living." But this no more indicates that the activity is conducted *primarily* for pleasure, see Treas. Reg. § 1.212-1(c), than does a large corporation's expenditure of huge sums for new product development and marketing indicate it. Also, nobody would deny that if one enjoys one's primary business activity financial losses suffered thereby are more happily endured than such losses would be if suffered in an activity one detests. But should one's happiness or unhappiness be conclusive on whether one is or is not in a business for

profit? Moreover, it seems inequitable that a well-capitalized corporation may undertake a long-range project despite the necessity of enduring continuous early losses in the launching of the project, but an affluent individual taxpayer may not. For example, here the Tax Court apparently disregarded the testimony of taxpayer's expert to the effect that "the enterprise should show a profit in proper time" and that taxpayer was "proceeding as expeditiously as possible" in her long-range plan of developing a new breed of luxury horses. While in this case I cannot term the Tax Court's inferences fallacious or its ultimate finding "clearly erroneous," I would suggest that the court in adjudicating cases of this kind could well give more serious consideration to such factors as whether the expectation of an ultimate profit is reasonable, how the operation is conducted, to what extent the taxpayer personally participates therein, and the likelihood that the activity taxpayer is engaged in is encompassed within the normal activities that occupy the time of other wealthy taxpayers. Surely such factors are as relevant to the question of a taxpayer's intent as the single factor of enjoyment of one's work. My views may be caused by "an academic desire for tidiness, symmetry and precision," but see *Commissioner* v. *Duberstein*, 363 U. S. 278, 289-90 (1960), and the thought that in tax matters the Tax Court's approach to a study of the motives of the very rich would seem to be materially different from the approach to a study of the motives of the rest of us.[2]

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[2] Compare, e.g., *Theodore Sabelis*, 37 T. C. 1058 (1962) and *Ralph A. Mauller*, T. C. Memo 1966-146 (June 24, 1966) with *Ellen R. Schley*, T. C. Memo 1965-111, and the present case, *Margit Sigray Bessenyey*, 45 T. C. 261 (1965).

APPENDIX C

Judgment of United States Court of Appeals

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of June one thousand nine hundred and sixty-seven.

Present:

HON. STERRY R. WATERMAN,
HON. HENRY J. FRIENDLY,
HON. ROBERT P. ANDERSON,
Circuit Judges.

MARGIT SIGRAY BESSENYEY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

APPEALS FROM THE TAX COURT OF THE UNITED STATES

This cause came on to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 531

MARGIT SIGRAY BESSENYEY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

During the years in question, 1955 through 1959, petitioner incurred substantial and recurring losses in the breeding and raising of riding and carriage horses known as Hungarian Half-Breds. The question presented is whether an expectation of profits was petitioner's primary motive in engaging in this activity. If so, petitioner can deduct the losses sustained in her horse-breeding operation under Section 162, 165, or 212 of the Internal Revenue Code of 1954. The Tax Court upheld the Commissioner's determination that petitioner could not deduct these losses because, after consideration of the entire record, it

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concluded that her horse-breeding activities were for personal satisfaction and were not engendered by a profit motive. The court of appeals affirmed, concluding that its review of the record did not leave it "with a definite and firm conviction that a mistake has been committed." (R. 29a; Pet. App. B A3–A17.) [1]

The issue presented is one of fact. The decision below is correct and there is no conflict of decisions or other basis for review by this Court.

1. Petitioner cannot deduct the expenses or losses relating to her activities as a breeder of Hungarian Half-Bred horses unless these activities were engaged in for the primary purpose of making a profit. *Helvering* v. *Nat. Grocery Co.*, 304 U.S. 282, 289, n. 5; *Morton* v. *Commissioner*, 174 F. 2d 302, 303 (C.A. 2), certiorari denied, 338 U.S. 828; *White* v. *Commissioner*, 227 F. 2d 779, 780 (C.A. 6), certiorari denied, 351 U.S. 939; *Hirsch* v. *Commissioner*, 315 F. 2d 731, 736–737 (C.A. 9). Whether such an intention exists is a factual question to be determined by the trier of fact. *Coffey* v. *Commissioner*, 141 F. 2d 204 (C.A. 5); *Morton* v. *Commissioner*, *supra*. Here the Tax Court's finding that petitioner "did not in fact have a *bona fide* intention to conduct her activities for a profit" is entitled to finality, unless, as the court of appeals below correctly stated (Pet. App. B A13), the inferences made by the trial judge as to petitioner's profit motive are "clearly erroneous". E.g., *Commissioner* v. *Duberstein*, 363 U.S. 278; *United States* v. *Gypsum Co.*, 333 U.S. 364.

[1] "R." references are to the taxpayer's appendix in the court of appeals.

During the years in issue, petitioner incurred total losses over $124,000, while during the following three years her losses exceeded $202,000 (Pet. App. B A4, n. 2).[2] Petitioner's first sale of a horse did not occur until late in 1964, more than a decade after the commencement of the enterprise (R. 20a). She professed indifference to her losses, and testified that she was importantly motivated by a desire to preserve this particular breed of horse (R. 28a). In holding on this record that petitioner's motive was not profit, the Tax Court did not, as petitioner contends (Pet. 13-17), establish a special rule for a wealthy taxpayer who was providing risk capital to a speculative or novel venture; what the court did was to recognize that the manner in which the farms were operated, when viewed in light of petitioner's personal wealth, justified the conclusion that profit was not her motive (R. 29). The conclusion reached by the courts below that petitioner's horse-breeding operation was not engenered by a profit motive is thus clearly factual in nature, amply supported by the evidence, and is inappropriate for further review here. *Comstock* v. *Group of Investors*, 335 U.S. 211, 214; *Rudolph* v. *United States*, 370 U.S. 269, 271.

[2] Petitioner received $129,587 in dividends and $18,743 in tax exempt income in 1956; the corresponding figures for 1959 were $139,504 and $10,417 (Pet. App. B, A7). Gross income from sales of tobacco and hay from the two farms of petitioner (one in Montana and one in Maryland) ranged from a low of $683 in 1958 to a high of $4,084 in 1959 (Pet. App. B A6). Her expenditures on the farms ranged from $6,027.80 to $75,549.12 during the period (R. 24a).

2. Petitioner contends that the standards of appellate review set forth in *Commissioner* v. *Duberstein, supra,* and followed by the court of appeals should not be applicable to the instant case because predictability of the tax treatment of expenditures is necessary (Pet. 17–20). Rather, petitioner urges adoption of an objective test of what constitutes a "trade or business" based upon whether the particular enterprise is conducted "in a business-like way" (Pet. 23–25). This argument ignores the definition of the term "trade or business" given by this Court in *Flint* v. *Stone Tracy Co.*, 220 U.S. 107, 171, as "that which occupies the time, attention and labor of men *for the purpose of a livelihood or profit.*" [Emphasis supplied.] The existence of a profit motive is thus an integral part of the definition of "trade or business" and necessarily involves a subjective inquiry. *Duberstein* involved such an inquiry, which "must be based ultimately on the application of the fact-finding tribunal's experience with the mainspring of human conduct to the totality of the facts of each case." (363 U.S. 278, 289). Such considerations must apply to the determination of a taxpayer's desire for profit just as they did in *Duberstein* to a determination of a transferor's intent. *Austin* v. *Commissioner*, 298 F. 2d 583 (C.A. 2); *Imbesi* v. *Commissioner*, 361 F. 2d 643 (C.A. 3); *Schley* v. *Commissioner*, 375 F. 2d 747 (C.A. 2). That some cases in this area are won by taxpayers, and others by the Commissioner, proves only

that the outcome of this type of litigation hinges upon the particular facts involved.[3]

3. Petitioner incorrectly argues that her losses only appeared substantial because of her use of the special tax rules for farmers in Treasury Regulations on Income Tax (1954 Code), Section 1.162–12 (Pet. 20–23). This regulation entitles a taxpayer who operates a farm for profit to deduct costs that would ordinarily be capitalized and depreciated. To begin with, the courts below clearly did not hold that the amount of the losses alone indicated the lack of a profit motive. On the contrary, the Tax Court observed that a profit motive "may in fact exist even in the face of a history of losses unaccompanied by any gains whatever * * *" (R. 26a). In no event should petitioner be heard to complain of the consequences of the use of an accounting method that she herself voluntarily chose in computing the farm losses that she sought to deduct from her other income.

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[3] Petitioner implies (Pet. 16) that the decision below employed a standard differing from that of *Doggett* v. *Burnet*, 65 F. 2d 191 (C.A. D.C.), but the portion of the *Doggett* opinion quoted by petitioner (Pet. 16), is plainly not in conflict with the holding below. In addition, the District of Columbia Circuit cited with approval (p. 193) Judge Learned Hand's statement in *Thacher* v. *Lowe*, 288 Fed. 994 (S.D. N.Y.), that "The test to me appears to be only of his actual intention." See also *Chaloner* v. *Helvering*, 69 F. 2d 571 (C.A. D.C.).

The petition for a writ of certiorari should be denied.

Respectfully submitted.

RALPH S. SPRITZER,
Acting Solicitor General.
MITCHELL ROGOVIN,
Assistant Attorney General.
JONATHAN S. COHEN,
STUART A. SMITH,
Attorneys.

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IN THE

Supreme Court of the United States

October Term, 1967

MARGIT SIGRAY BESSENYEY,

Petitioner,

v

COMMISSIONER OF INTERNAL REVENUE.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

ORRIN G. JUDD
Attorney for Petitioner
655 Madison Avenue
New York, N.Y. 10021
(212) 838-3700

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32 CASE PRESS INC., 421 HUDSON ST., N.Y.—ORegon 5 4540

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REPLY BRIEF FOR PETITIONER

Respondent's memorandum stretches the facts beyond anything in the record, in its assertion that petitioner "professed indifference to her losses" (p. 3). The portion of the opinion cited by respondent (p. 28-a) does not support the assertion, and is directly contrary to petitioner's sworn testimony that she expected to make a profit and would not continue if she never made a profit (Petn., pp. 10-11).

The extremity of this case may account for respondent's action. The Court of Appeals indicated quite clearly that it would regard the Tax Court's decision as erroneous, except for the restrictions which *Commissioner* v. *Duberstein*, 363 U.S. 278 (1960) was deemed to place on the scope of review.

Such an application of *Duberstein* is really "an example of an undue and unfortunate yielding of responsibility to juries and other triers of the facts", to quote a commentator

who is not noted as a partisan of taxpayers. (Griswold, *Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 Harv. L. Rev. 81, 90–1960).

The *Imbesi* case (361 F. 2d 643), cited by respondent (Memo., p. 4), represents a different approach to the problem from that of the Court below, for the Third Circuit Court of Appeals in the *Imbesi* case reversed a Tax Court determination, where the Tax Court disregarded positive testimony of a profit motive without explaining the reason for its finding.

The respondent's answer to the point concerning deductibility of farm losses is not responsive (Memo., p. 5). The question is not the taxpayer's choice of a particular method of computation, but the fact that the amount of losses is distorted by the special privilege given to agricultural taxpayers, of expensing items which other taxpayers must treat as capital costs.

The Tax Court, and the taxpayers whose affairs may come before that Court, are entitled to have the appellate courts set guidelines for deciding issues like the business character of an enterprise. This is an appropriate case for this Court to establish such guidelines, and to mark the limits on the freedom of a factfinder to be unpredictable.

CONCLUSION

The petition for certiorari should be granted.

New York, New York
September 28, 1967.

Respectfully submitted,

ORRIN G. JUDD,
Attorney for Petitioner.

HENRY B. HYDE,
EARLE K. MOORE,
RONALD DREIER,
Of Counsel.